MOTION FILED

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No. 06-926

IN THE

Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,
Petitioner,

v.

GENERAL MOTORS CORP., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* CMA BUSINESS CREDIT SERVICES IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE

Credit Managers Association ("CMA"), which does business as CMA Business Credit Services, hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Consent to the filing of this brief has been obtained from counsel for the petitioners. Counsel for respondents have not consented.

With over 2,000 member companies across a broad range of industries, CMA is a California nonprofit corporation that provides a full array of business insolvency services. Among other services, CMA is frequently designated by bankruptcy courts to serve as secretary to the official creditors' committee in reorganization cases. In liquidation cases, CMA often accepts a general assignment for the benefit of creditors from the debtor.

In petitioner Daewoo Motor America, Inc.'s ("Daewoo America") Chapter 11 proceeding, CMA was appointed Trustee of the Creditor Trust at the suggestion of petitioner and with the endorsement of the Official Unsecured Creditor's Committee. CMA holds 95% of the stock of petitioner in trust for, and for the benefit of, the thousands of consumers and small businesses holding unsecured claims against the petitioner. Taken together, these creditors have filed claims for more than $840 million (with an allowed value of $519 million). As a result of the Eleventh Circuit's decision in this case, those claims have very little value.

More generally, in light of the growing internationalization of business, CMA increasingly faces issues concerning the effect of foreign proceedings on a domestic bankruptcy. Accordingly, CMA's interest in resolving the issues of international comity raised by this case extend beyond the effect of the decision below on the creditors of Daewoo America. With questions of comity

becoming ever more common, particularly in the international bankruptcy context, the ill effects of the Eleventh Circuit's analysis will be widely felt, including by CMA's members, the creditors it represents in this case, and other creditors that it will represent in future cases.

CMA, its members, and the creditors it represents have a strong interest in the outcome of this case because the decision of the Eleventh Circuit expanded the doctrine of international comity beyond all sensible limits. In doing so, the Eleventh Circuit ignored both the limits on comity established by other circuits and the guidance of this Court.

CMA's *amicus* filing focuses primarily on matters not addressed to any significant extent by petitioner. In particular, the majority of the argument (all of Section II) explains that the court of appeals' erroneous decision to apply "abuse of discretion" rather than *de novo* review to the district court's decision precluding petitioner's fraud claims results from a line of Eleventh Circuit decisions that have inappropriately transformed international *res judicata* cases into abstention cases. This Court's review is needed to bring the Eleventh Circuit's jurisprudence into line with that of this Court and other circuits.

CMA also argues that the Eleventh Circuit's opinion squarely conflicts with the Third Circuit's decision in *Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987). Specifically, the Eleventh Circuit (unlike the Third Circuit) applies the doctrine of comity to preclude claims brought against entities *other* than the foreign debtor that could *not* have been presented in the foreign proceeding. The decision below is also inconsistent with this Court's decision in *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), because the Eleventh Circuit precluded petitioner's claims based on the

plan approval order of a Korean reorganization court – which has no jurisdiction to hear such claims – even though other Korean courts would not have given it preclusive effect. Furthermore, the Eleventh Circuit ignored this Court's guidance in *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), requiring that the rights of American citizens such as the creditors represented by CMA be weighed against the overly expansive application of foreign judgments.

In short, *amicus* has grave concerns about the implications of the lower court decision, and a great interest in securing expeditious review of the questions presented. The motion for leave to file the attached brief should be granted, and the Court should review and reverse the lower court decision.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a district court's dismissal of a lawsuit, under the doctrine of international comity and based on the preclusive effect of a foreign judgment, is reviewable *de novo* or only for abuse of discretion.

2. Whether the doctrine of international comity may be invoked, based on a prior order of a foreign bankruptcy court approving a plan of reorganization for a foreign debtor, to bar a lawsuit in U.S. courts, where the precluded claims are asserted against parties *other* than the foreign debtor and could not have been brought in the foreign proceeding.

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INTEREST OF AMICUS CURIAE[1]

Credit Managers Association ("CMA"), which does business as CMA Business Credit Services, is a California nonprofit corporation providing business insolvency services. CMA was founded in 1883 and has approximately 2,100 member companies representing a broad spectrum of industries. Among the many services it provides, CMA is frequently authorized by bankruptcy courts to serve as secretary to the official creditors' committee in reorganization cases. In liquidation cases, CMA often accepts a general assignment for the benefit of creditors from the debtor.

In this case, CMA was appointed Trustee of the Creditor Trust at the suggestion of petitioner and with the endorsement of the Official Unsecured Creditor's Committee. CMA holds 95% of the stock of petitioner in trust for, and for the benefit of, the thousands of holders of unsecured claims in petitioner's Chapter 11 proceeding. More generally, as a result of the growing internationalization of business, CMA, the creditors it represents, and its member companies increasingly face situations where issues arise concerning the effect of foreign proceedings on a domestic bankruptcy or on U.S. creditors. Accordingly, CMA has a strong interest in the outcome of this case.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the named *amicus curiae* and its counsel, contributed monetarily to the preparation or submission of this brief.

PRELIMINARY STATEMENT

The petition for a writ of certiorari filed by Daewoo Motor America, Inc. ("Daewoo America") presents issues of fundamental significance to American businesses. The Eleventh Circuit expanded the doctrine of international comity beyond sensible limits by barring hundreds of millions of dollars of claims against respondents on the basis of a Korean reorganization court's order approving a plan of reorganization for a debtor that is not a party to this litigation.

The Eleventh Circuit held that fraud claims asserted against respondents are precluded by the Korean reorganization court's plan approval order even though respondents were not debtors in the Korean proceeding and even though Korean civil courts would not have barred petitioner's fraud claims on the basis of the Korean reorganization court's order. In reaching that result, the Eleventh Circuit ignored both the limits on comity established by other circuits and the guidance of this Court, including the requirement that the rights of American citizens such as the creditors represented by CMA be weighed against the overly expansive application of foreign judgments. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (requiring "due regard" for the "rights of [United States] citizens" in the application of international comity). The Eleventh Circuit also erroneously reviewed the district court's decision under the abuse of discretion standard when *de novo* review is warranted.

At stake here are thousands of claims by the creditors of Daewoo America, including those of hundreds of consumers and small businesses. Daewoo America's core claim is that, while respondent General Motors Corporation ("GM") was negotiating to acquire the assets of Daewoo Motor Co., Ltd. ("Daewoo Korea"), GM misled Daewoo America.

Specifically, Daewoo America alleges that GM repeatedly assured Daewoo America that it would be included in the GM acquisition and would continue to be the exclusive distributor of Daewoo vehicles in the United States after the acquisition. Daewoo America further alleges that, relying on those assurances, it continued to invest in its distributor operations and incur liabilities to dealers. Thereafter, GM excluded Daewoo America from its agreement with the Daewoo Korea Receiver. Daewoo America's supply of vehicles was terminated, its distribution business was ruined, and it ultimately filed for bankruptcy relief under Chapter 11.

After Daewoo America's bankruptcy filing, its creditors filed claims for more than $840 million, and the value of the allowed claims is approximately $519 million. The largest group of allowed claims, for approximately $270 million, is from former Daewoo dealers. Consumers filed nearly 3,000 allowed claims for approximately $21 million. Other businesses both large and small filed hundreds more claims. *See* Daewoo Motor America, Inc. Claims Analysis, Exhibit 7 to DMA's Sixth Amended Chapter 11 Plan of Reorganization, dated July 24, 2003, Case No. LA 02-24411-BB (Bankr. C.D. Cal.). As a result of the Eleventh Circuit's decision in this case, those claims have very little value.

Beyond the effect of the decision below on the creditors of Daewoo America, issues involving international comity are growing exponentially in importance. Of the more than 1,300 references to international comity in the federal and state court decisions of this country, nearly half (over 600) are from the last ten years. Indeed, it is widely reported that issues relating to the preclusive effect of foreign judgments arise "increasingly often today as a result of an unprecedented expansion of transnational economic activities and a resulting increase in international business disputes." M. Trevino de Coale, *Stay, Dismiss, Enjoin, or Abstain: A*

Survey of Foreign Parallel Litigation in the Federal Courts of the United States, 17 B.U. Int'l L.J. 79, 80 (1999).

The Eleventh Circuit's decision gives foreign judgments greater preclusive effect than American judgments. That would make no sense even if international comity issues arose only infrequently. But with questions of comity becoming ever more common, the ill effects of the Eleventh Circuit's analysis will be widely felt.

SUMMARY OF THE ARGUMENT

The decision below barred hundreds of millions of dollars of claims against respondents by giving unwarranted preclusive effect to the plan approval order of a Korean reorganization court. The Eleventh Circuit's erroneous decision conflicts with decisions of this Court and other courts of appeals.

I. The decision below expanded the doctrine of comity to allow preclusion of claims that could *not* have been presented in the foreign proceeding and are brought against entities *other* than the foreign debtor. That approach flatly conflicts with the Third Circuit's decision in *Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987). In that case, the Third Circuit correctly held that non-debtors in a foreign proceeding cannot use a foreign judgment "as a shield" because that would not advance the purposes of either bankruptcy law or the doctrine of comity.

The Eleventh Circuit's decision is also inconsistent with this Court's decision in *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985). The Court held in *Marrese* that a federal court may not give preclusive effect to a state court judgment where a state court would not do so, and there is no good reason to give greater preclusive effect to a foreign court judgment. Moreover, the foreign court lacked jurisdiction over the claims the Eleventh Circuit has

held to be precluded, and its judgment should not be given preclusive effect in that circumstance.

The Eleventh Circuit failed to follow the guidance of this Court in *Hilton v. Guyot*, 159 U.S. at 164, which requires "due regard" for the rights of United States citizens in the application of international comity. Thousands of Daewoo America creditors filed hundreds of millions of dollars in claims for losses resulting from respondents' wrongdoing. As required by *Hilton*, the lower court should not have extinguished those claims based on a foreign court judgment without evaluating the equities – particularly where the foreign court could not and did not adjudicate such claims.

II. This Court should also review the Eleventh Circuit's decision to apply the abuse of discretion standard. The court below declined to review the district court's decision *de novo* because it concluded that this case involves abstention issues. Pet. App. 10a. But it does not. The issue here is not whether it makes sense to refrain from interfering with an ongoing proceeding elsewhere, but whether to give preclusive effect to a judgment already issued. That makes this a *res judicata* case rather than an abstention case – and *de novo* review is warranted in *res judicata* cases. The court of appeals' erroneous decision follows from a line of Eleventh Circuit decisions that have inappropriately transformed international *res judicata* cases into abstention cases. This Court's review is needed to bring the Eleventh Circuit's jurisprudence into line with that of this Court and other circuits.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S INTERNATIONAL COMITY RULING UNREASONABLY EXPANDS THAT DOCTRINE.

The Eleventh Circuit barred claims against entities other than the debtor in the Korean reorganization proceeding. It

did so even though a Korean court would not bar those claims, and without adequately considering the interests of American citizens. Its decision is contrary to decisions of this Court and courts of appeals.

A. The Decision Below Conflicts With *Remington Rand* Because Respondents Were Not Debtors In The Korean Reorganization Proceeding.

Daewoo America seeks damages from respondents for misrepresenting that Daewoo America would continue to be the exclusive American distributor for Daewoo vehicles after GM's acquisition of Daewoo Korea. Petitioner argued below that comity should not bar this claim because it does "not involve the same cause of action and the same parties" as the foreign reorganization proceeding. Pet'r C.A. Br. at 51. Daewoo America added that "not even a Korean civil court would preclude DMA from suing the Defendants." Pet'r C.A. Reply Br. at 14 (citation omitted). Moreover, petitioner explained that it would be inconsistent with the purposes of both bankruptcy law and the doctrine of comity to allow a foreign judgment to be "used as a shield by the non-debtor Appellees." *Id.* at 12.

The Eleventh Circuit did not meet these arguments head on. It did not dispute that petitioner's fraud claim against non-debtor parties was not presented to and could not have been adjudicated by the Korean court. Nor did it conclude that respondents were debtors in the Korean reorganization proceedings. Rather, the court invented an unprecedented legal impediment to petitioner's claims. Specifically, the Eleventh Circuit held that comity bars petitioner's claims because they are "intertwined with the order of the Korean

court" and "arise out of the same nucleus of operative facts considered by the Korean court." Pet. App. 16a.[2]

The lower court thus held that *it does not matter* that petitioner's claims were not (and could not have been) heard by the Korean court or that respondents were not debtors in that action. This new approach to questions of comity represents a dangerous split from sounder precedents in other circuits and from this Court's jurisprudence.

In *Remington Rand*, the Third Circuit held that non-debtors in a foreign insolvency proceeding could *not* use the foreign judgment "as a shield." The court explained that the rationale for precluding claims against a foreign debtor – "to allow a foreign debtor's assets to be distributed equitably," 830 F.2d at 1267 – is simply inapplicable to entities other than the foreign debtor. *See also JP Morgan Chase Bank v. Altos Hornos De Mexico*, 412 F.3d 418, 424 (2d Cir. 2005) (American courts defer to foreign bankruptcy proceedings because "the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding") (citation omitted). The decision below conflicts with that decision, and the Third Circuit's approach is the sounder one.

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[2] Respondents Suzuki Motor Corporation and American Suzuki Motor Corporation ("Suzuki Respondents") creatively interpret this section of the Eleventh Circuit's opinion as holding that petitioner *could* (and should) have presented all of its claims to the Korean bankruptcy court. *See, e.g.*, Resp. Br. at 24-25. But the Eleventh Circuit said no such thing, and the Korean court would not have had jurisdiction to consider petitioner's tort claims. *See* below at pp. 9-10.

The Suzuki Respondents (*see* Resp. Br. at 19-21) seek to harmonize the decision below with *Remington Rand* by emphasizing the Eleventh Circuit's view (*see* Pet. App. 16a, 17a) that petitioner's request for injunctive relief on some claims would have required that the "'transfer [of assets under the MTA and Modified Reorganization Plan approved by the Korean court] be set aside.'" As Judge Tjoflat pointed out, however, petitioner also sought damages on thirteen of its fourteen claims. Pet. App. 27a n.8. Judge Tjoflat accordingly understood that "[f]or the vast majority of Daewoo America's claims, the proceedings before the Korean bankruptcy court serve as little more than a factual backdrop." *Id.* at 19a. Plainly, a monetary award *against GM* would not have any effect on the "orderly distribution" of the Daewoo Korea assets addressed by the Korean court. And equally plainly, even if it were proper to allow the Korean judgment to bar any claims that *would* have interfered with the Korean court's decision, it makes no sense to allow that decision to be invoked against claims for damages that would have no such effect.

In short, in contrast to *Remington Rand*, the rule adopted by the Eleventh Circuit allows non-debtor third parties to rely on foreign judgments to bar claims that do not undercut a foreign bankruptcy decision. That unwarranted expansion of international comity severely prejudices the rights of the creditors that CMA represents here and others it will represent in future transnational bankruptcy proceedings.

B. The Decision Below Is Contrary To *Marrese* Because Korean Courts Would Not Bar Petitioner's Claim.

The Eleventh Circuit's view that it does not matter whether Daewoo America's claims were presented to the Korean Court so long as they relate to the "operative facts" at

issue there is inconsistent with this Court's decision in *Marrese*. This Court held that a federal court may not give preclusive effect to a state court judgment where a state court would not do so. The Court pointed out that claim preclusion obviously should not apply when a plaintiff could not have "rel[ied] on a certain theory of the case or . . . [sought] a certain remedy because of the limitations on the subject matter jurisdiction of the courts.'" 470 U.S. at 382. The Court concluded that under the relevant federal statute, 28 U.S.C. § 1738,[3] a federal court may not "give greater preclusive effect to a state court judgment than would the judgment-rendering state." *Id.* at 384.

The same principle should apply here: A Korean court's decision plainly should not be given *more* preclusive effect by a federal court than the decision of the court of a state within our federal system.[4] Yet that is precisely what happened below – the Eleventh Circuit precluded claims that the Korean civil courts would have allowed to go forward. In the lower courts, Daewoo America presented a declaration from a Korean legal expert explaining that Korean reorganization courts do not have jurisdiction over general civil claims or claims against the debtor arising after the

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[3] Section 1738 provides that "judicial proceedings ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[4] Under the Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, "a Korean judgment is elevated to the status of a sister state judgment." Pet. App. 15a.

commencement of bankruptcy proceedings. *See* Exhibit 1 to Pet'r 11th Cir. Br. at ¶ 16. The Korean reorganization court therefore "made no ruling" with respect to Daewoo America's claims against respondents. *Id.*, ¶ 20. As a result, "not even a Korean civil court would preclude DMA [Daewoo America] from suing the Defendants based on doctrines of comity, res judicata, or collateral estoppel." *Id.*

GM's expert below did not refute this opinion. He did not claim that the Korean reorganization court had jurisdiction to adjudicate petitioner's fraud claims, or that it would have done so. Rather, in his affidavit GM's expert indicated only that Daewoo America's tort claims are "properly heard, if at all, in a Korean Court." Sang-Hyun Song 11th Cir. Aff. ¶ 14. In fact, however, under *Marrese*, if the Korean courts would not preclude Daewoo America's claims – and they would not – then those claims should be allowed to proceed in United States district court as well.

The Suzuki Respondents argue that there is no conflict with *Marrese* here because petitioner purportedly "*could* have brought its claims in the Korean [reorganization] proceeding." Resp. Br. 27. However, the Eleventh Circuit did not say that – instead it held, contrary to the Third Circuit's decision in *Remington Rand*, that even a non-debtor third party may invoke a foreign judgment to preclude *any* claim arising from the same "operative facts" as the foreign judgment. The Eleventh Circuit found a commonality of "operative facts" sufficient to give the Korean reorganization court's plan approval order preclusive effect with respect to Daewoo America's claims against GM *regardless* of whether that court had jurisdiction over the claims and *regardless* of whether a Korean civil court would have accorded that judgment such claims preclusive effect – matters as to which the Eleventh Circuit made no findings. That rule conflicts not only with *Remington Rand*, but with *Marrese* as well.

C. The Decision Below Failed To Adequately Consider The Interests Of American Citizens.

The Eleventh Circuit recited the long-established rule that a court applying the doctrine of international comity should consider "the rights of its own citizens." *Hilton v. Guyot*, 159 U.S. at 164; *see* Pet. App. 13a. But the court failed to observe the rule. Instead, the Eleventh Circuit held only that "Daewoo America has not identified any 'public policy notion[] of what is decent and just' that is offended by the application of comity to the Korean bankruptcy order." Pet. App. 15a. The Eleventh Circuit thereby effectively substituted its own vague public policy inquiry, *see, e.g., Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2006), for the weighing of citizens' rights required by the *Hilton* case.

In fact, the rights of American citizens affected by the lower court's comity decision are substantial. The thousands of Daewoo America creditors who filed claims in this proceeding have an enormous stake in the outcome here. Those creditors, including hundreds of consumers and small businesses, have filed half a billion dollars in claims. Yet the courts below failed even to mention their interests of in performing the comity analysis.

The severe prejudice to those creditors of expanding the doctrine of comity to block their claims is obvious. As alleged by Daewoo America, respondent's misrepresentations caused it and its dealers to continue to invest large sums in the expectation of a continuing U.S. distributorship – money that was lost when GM reneged on its representations. In contrast, the only possible consequence of allowing petitioner's claims to go forward is that respondents might be called upon to redress the harm that they caused. These claims by one non-debtor in the

Korean re[illegible]nization proceeding against other non-debtors in that p[illegible]eding are of no concern to the Korean reorganization court. As required by *Hilton*, the lower court should have at least evaluated these equities.

The doctrine of international comity "has never been well-defined, leading one scholar to pronounce it 'an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.'" *JP Morgan Chase Bank*, 412 F.3d at 423 (quoting Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 281 (1982)). This Court's guidance is sorely needed to correct the Eleventh Circuit's expansion of the doctrine, which unreasonably harms American citizens.

II. PRINCIPLES OF *RES JUDICATA* RATHER THAN ABSTENTION GOVERN THIS CASE AND DICTATE *DE NOVO* REVIEW.

The Eleventh Circuit incorrectly held that "the principle of international comity applied in this case is an abstention doctrine" subject to "abuse of discretion" review. Pet. App. 10a. That decision is inconsistent with the Second Circuit's decision in *Diorninou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001), and also is manifestly incorrect. First, principles of *res judicata*, not abstention, govern this case and dictate *de novo* review. Second, even if abstention analysis were applicable here, *de novo* review would apply to the district court's decision because it rests on a legal determination. This Court should grant certiorari to ensure that applications of international comity respect that fundamental rule.

A. The District Court's Comity Holding Involved The Application Of *Res Judicata* Principles.

The district court invoked international comity to determine the preclusive effect of an order already entered by

the Korean reorganization tribunal, not to avoid interfering with ongoing foreign proceedings. The decision was thus akin to a determination of *res judicata* rather than to abstention.

A brief review of this Court's abstention jurisprudence underscores the difference. Abstention is a narrow exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). This Court's precedents establish five widely recognized forms of abstention. None of them resembles the action taken by the district court in this case.

The first three variations on abstention permit a federal court to stay its hand when important questions of unclear state law would be better resolved by concurrent or future state proceedings. First, *Pullman* abstention allows a federal court to abstain when a state court's clarification of uncertain state law in a pendant claim would permit the federal court to avoid a constitutional question. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941). Second, in diversity cases, a federal court may exercise *Thibodaux* abstention where an important issue of state law intimately involved with the State's sovereign prerogatives remains unclear. *La. Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 30-31 (1959). Third, *Burford* abstention allows a federal court to abstain where state law is unclear and there is a need to defer to complex state administrative procedures. *Burford v. Sun Oil Co.*, 319 U.S. 315, 333-34 (1943). In all of these circumstances, however, once the state tribunal has resolved the state-law issue or issues, there is no further basis for abstention. In other words, the justification for abstention resides in the availability of a *forthcoming* state court clarification of state law.

The fourth form of abstention – *Younger* abstention – differs from the previous three in that it *requires* (rather than permits) federal courts to abstain from interfering in ongoing state enforcement proceedings through the issuance of an injunction or declaratory relief.[5] *See Younger v. Harris*, 401 U.S. 37 (1971) (abstaining from enjoining pending criminal proceeding). Once again, however, the justification for abstention is the *ongoing* state action. *See Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (The "principles of equity, comity, and federalism" that compel *Younger* abstention lack "force in the absence of a pending state proceeding.") (citation omitted).

Fifth, and finally, the Court articulated a narrow basis for abstention in *Colorado River*, under which a federal court may sometimes abstain because of duplicative litigation in state court. More specifically, in rare cases the interests of "wise judicial administration" and a "comprehensive disposition of the litigation" may outweigh the duty to exercise jurisdiction. *Id.* at 817 (citation omitted). Again, however, the basis for *Colorado River* abstention lies in the existence of ongoing duplicative proceedings in state court.

As this brief review shows, abstention is fundamentally a forward-looking concept. Central to the doctrine is the principle that concurrent state proceedings may, in the future, best resolve certain issues properly before a federal court.

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[5] Because the district court "*must* dismiss the federal action" when "a case falls within the proscription of *Younger*," there is broad agreement among the courts of appeals that *Younger* abstention determinations are reviewed *de novo*. *See, e.g., World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081-82 (9th Cir. 1987).

And deciding whether a future state determination would, in fact, resolve issues in a manner preferable to federal court adjudication of those issues necessarily calls for the exercise of judgment or discretion on the part of the district court. Such an exercise of judgment is, of course, appropriately reviewed under an abuse of discretion standard.

In contrast, where a state court judgment has already been entered, the concerns of abstention must give way to the backward-looking principles of *res judicata*. Stated most simply, *res judicata* comprises rules precluding a court from hearing a matter that another court has already resolved. Because the question what has been resolved is a legal one, district court decisions applying *res judicata* principles should be reviewed *de novo*. *See, e.g., Bates v. Township of Van Buren*, 459 F.3d 731, 734 (6th Cir. 2006).

This same distinction between the forward-looking, discretionary exercise required in abstention cases and the backward-looking, legal one involved in *res judicata* situations exists in the context of international comity determinations. Where concurrent foreign proceedings are ongoing, a federal district court may be called upon to make a discretionary determination regarding which suit may best resolve specific issues.[6] But where a foreign tribunal has

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[6] Indeed, as cited by the Suzuki Respondents, *see* Resp. Br. at 14 & n.9, appellate courts have reviewed comity decisions involving *pending* foreign bankruptcy proceedings for abuse of discretion. *See, e.g., JP Morgan Chase Bank*, 412 F.3d at 422 (reviewing lower court's decision to apply comity in light of a "pending foreign bankruptcy proceeding"); *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 242 (2d Cir. 1999) (reviewing extension of comity to on-going Brazilian liquidation proceedings); *Jota v. Texaco Inc.*, 157

already entered judgment, the U.S. court must primarily determine – through the application of *res judicata* principles – which matters have been "judged" so as to preclude relitigation. That is a legal question that should be subject to *de novo* review.[7]

This case plainly involves the latter kind of determination. The district court was called upon to determine as a matter of law whether the Korean court would even have had jurisdiction to decide the issues presented by Daewoo America in federal court. If the Korean court could not have ruled on those issues even had they been raised before it, then its decision should not be given preclusive effect. Because that was a legal question to be decided under

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F.3d 153, 159 (2d Cir. 1998) (reviewing extension of comity to pending proceedings in Ecuador); *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 856 (2d Cir. 1997) (reviewing denial on grounds of comity of motion to stay U.S. proceedings in deference to pending foreign proceedings); *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) (reviewing extension of comity to pending Australian liquidation proceedings); *Cunard S.S.Co. v. Saleen Reefer Servs.*, 773 F.2d 452, 460 (2d Cir. 1985) (reviewing decision to grant comity to pending Swedish bankruptcy proceedings).

[7] In previous cases, the Eleventh Circuit has referred to the backward-looking analysis as "retrospective comity" rather than preclusion or *res judicata*. *See Ungaro-Benages*, 379 F.3d at 1238-39. But changing the name does not affect the legal nature of the determination made, and should not affect the standard of review.

res judicata principles, the court of appeals erred by declining to review the district court's decision *de novo*.

B. *De Novo* Review Would Apply Here Even If The Case Involved "Abstention."

As discussed above, the Eleventh Circuit's determination that this case involves "an abstention doctrine" is simply incorrect. It bears emphasis, however, that even were this properly viewed as an abstention case, the Eleventh Circuit's decision to review the trial court's ruling only for abuse of discretion would still be both wrong and inconsistent with the decisions of other circuits in the only abstention cases – *Colorado River* cases – even arguably analogous here.

As set forth above, *Pullman, Burford, Thibodaux*, and *Younger* abstention all relate "to considerations of proper constitutional adjudication and regard for federal-state relations." *Colorado River*, 424 U.S. at 817. The abuse of discretion standard is appropriate for review of such determinations.[8] This case does not involve constitutional adjudication or federalism. However, *Colorado River* abstention involves "considerations of '[wise] judicial administration, giving regard to conservation of judicial

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[8] The only case cited by the court below on the question of standard of review involved *Burford* abstention. *See Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260 (11th Cir. 2000). In the majority of the circuits, lower court applications of *Burford* abstention are, indeed, subject to review for abuse of discretion. *See, e.g., First Penn-Pacific Life Ins. Co. v. William R. Evans, Chtd.*, 304 F.3d 345, 348 (4th Cir. 2002). *But see Superior Beverage Co. v. Schieffelin & Co.*, 448 F.3d 910, 913 (6th Cir. 2006) (reviewing *de novo*).

resources and comprehensive disposition of litigation.'" *Id.* (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)).

While this case is not an abstention case at all, the Eleventh Circuit presumably believed that it implicates "considerations of wise judicial administration" and "conservation of judicial resources." Indeed, the Eleventh Circuit has previously relied on *Colorado River* abstention principles in addressing the question whether to follow a foreign judgment. *See Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994). In *Turner*, the court found it "helpful" to "take[] the criteria enunciated in *Colorado River* and appl[y] them to the international context." *Id.* Subsequently, in *Ungaro-Benages*, 379 F.3d at 1237, the Eleventh Circuit cited this aspect of *Turner* for the proposition that "[i]nternational comity . . . is an abstention doctrine." The decision below in turn cited *Ungaro-Benages* for that same proposition. Pet. App. 10a.

Leaving aside the question whether it makes any sense to consider this an abstention case merely because *Colorado River* principles may be "helpful" to the analysis, the Eleventh Circuit's decision below fails to recognize that conflating this case with *Colorado River* abstention should be the *beginning* of the standard of review analysis, not the end. That initial determination only begs the question what standard of review applies in *Colorado River* cases.

Appellate decisions on that subject are neither unanimous nor clear, but most circuits apply *de novo* review to some or all aspects of the *Colorado River* analysis. The Seventh Circuit, for example, has explained that "[i]n evaluating the propriety of the district court's decision to abstain under *Colorado River*, [the reviewing court] must first determine whether the . . . proceedings are parallel . . . . This is a legal

issue which we review *de novo*." *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 518 (7th Cir. 2001).

Furthermore, a number of the circuit courts do not limit *de novo* review in *Colorado River* cases to the "parallel proceedings" inquiry. The Ninth Circuit, for example, has stated that "[w]hether the facts of a particular case conform to the requirements for a *Colorado River* stay or dismissal is [also] a question of law which we review *de novo*." *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1032 (9th Cir. 2005). The Fifth Circuit applies this basic approach not only to *Colorado River* review but to all abstention cases, reviewing "*de novo* whether the requirements of a particular abstention doctrine are satisfied." *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 652 (5th Cir. 2002).

The basic principle running through these decisions is the traditional rule that district court exercises of discretion – as in predicting whether a state court would be better situated to address a specific issue of state law – are reviewed for abuse of discretion. But district court determinations of law – such as whether another court has already decided an issue or whether the requirements of a particular abstention doctrine are satisfied – are reviewed *de novo*. In this case, the question whether the Korean court even had jurisdiction to decide the issues presented is plainly a matter of law, regardless of whether *res judicata* or abstention analysis applies.

Against this backdrop, the reason why the Eleventh Circuit got the standard of review wrong here turns out to be far larger than just this case: The Eleventh Circuit does not apply the simple principles set forth above *either* in *Colorado River* cases *or* in international comity cases. Rather, the court categorically reviews abstention decisions for abuse of

discretion without considering the nature of the specific district court determination at issue. Specifically, the Eleventh Circuit holds to the unnuanced view that "[t]he standard for reviewing a district court's exercise of *Colorado River* abstention . . . is abuse of discretion." *See, e.g.*, *Metro. Life v. Lockette*, 155 F.3d 1339, 1341 n.2 (11th Cir. 1998); *see also Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56 (1st Cir. 2005), and *Al-Abood v. Elshamari*, 217 F.3d 225 (4th Cir. 2000) (both circuits apparently sharing the Eleventh Circuit's categorical approach to *Colorado River* review). And in the case of the present international comity determination, the Eleventh Circuit found simply that "international comity . . . is an abstention doctrine" and "a district court's decision to abstain will be reversed only upon a showing of abuse of discretion." Pet. App. 10a.

In sum, although this case presents no issue of abstention, the Eleventh Circuit's abstention cases explain why that court failed to apply the proper standard of review. The reason is disturbingly systemic: Rather than looking at the nature of the district court determination challenged on appeal to determine the proper standard of review, the Eleventh Circuit relies – both here and in abstention cases – on wooden categorization. This Court should take this case to correct that systemic problem in the Eleventh Circuit and other courts taking a similar approach.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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